NO. 45996-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CLAUDE HUTCHINSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ISSUE PERTAINING TO MOTION TO MODIFY

Whether this Court may rule on a challenge to appellate costs raised for the first time in a motion to modify the Commissioner's award of costs.

B. FACTS PERTAINING TO ISSUE

Mr. Hutchinson appealed his convictions and was appointed counsel on appeal under an order of indigency. CP 235-36. Mr. Hutchinson filed his opening brief on November 14, 2014, and the State filed the Brief of Respondent on March 16, 2015. In a part-published opinion entered March 1, 2016, this Court affirmed Mr. Hutchinson's convictions. The State filed a cost bill on March 10, 2016, and the Commissioner granted the cost bill on August 8, 2016, ordering Mr. Hutchinson to pay $7.31 to the Pierce County Prosecutor's Office and $6122.45 to the Office of Public Defense, with $3035.46 being joint and several with co-appellant Young.

On September 12, 2016, Mr. Hutchinson filed a motion to modify the commissioner's ruling and deny the State's request for appellate costs. This Court ordered supplemental briefing on whether Mr. Hutchinson's failure to object to the cost bill waived his challenge to the commissioner's ruling awarding costs.

C. ARGUMENT

THIS COURT SHOULD HOLD THAT A CHALLENGE TO APPELLATE COSTS IS TIMELY MADE WHEN FIRST RAISED IN A MOTION TO MODIFY THE AWARD OF COSTS.

In State v. Grant, ___ Wn. App. ___, 385 P.3d 184 (2016), this Court concluded that appellate costs may be challenged in a motion to modify the commissioner's award following an objection to the cost bill.[1] The court noted that its conclusion was supported by concerns that a motion to modify is generally the first opportunity to challenge an award of appellate costs after the award has been made, there are significant difficulties with imposing appellate costs on indigent appellants, and the legislature has expressed its intent that appellate courts exercise discretion over imposing appellate costs. Grant, 385 P.3d at 187. These same concerns also support the conclusion that, even without a prior objection to the cost bill, an objection to costs is timely made in a motion to modify the commissioner's ruling on costs.

Under RAP 14.2, the commissioner must award costs when requested by the party substantially prevailing on review, unless the court directs otherwise in the decision terminating review. The commissioner has no discretion to deny an award of costs. Under the rules, when the

[1] The Court left open the question of whether the challenge would have been timely in the absence of an objection to the cost bill. Grant, 385 P.3d at 188 n.3.

prevailing party files a cost bill, the commissioner "will award costs...." RAP 14.2. It is not until a motion to modify the commissioner's ruling on costs is filed that any discretion as to whether costs are appropriate may be exercised. At that point, the appellate court reviews the commissioner's ruling on costs de novo. The entry of an award of costs by the commissioner is thus the appropriate time to require a defendant to challenge those costs. Grant, 385 P.3d at 186. Requiring an objection to costs before the commissioner awards costs, when that objection cannot impact the commissioner's ruling, would be pointless.

Moreover, while RAP 14.5 requires an objection to "items in the cost bill" within 10 days of service of the cost bill, this rule appears to apply to an objection to calculation of the costs being requested, rather than to an objection to awarding costs. This interpretation is consistent with RAP 14.2, which requires the commissioner to award costs to the prevailing party.

In addition, as this Court recognized in Grant, the provisions of the rules of appellate procedure may be altered or waived to serve the ends of justice. Grant, 385 P.3d at 186; RAP 1.2(c). To the extent the rules would require a challenge to costs prior to the commissioner's award of costs, this Court should waive that requirement in the interests of justice. There can be no doubt of the "problematic consequences" legal financial

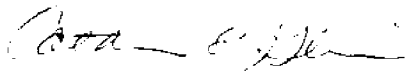
obligations inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). The exercise of judicial discretion in imposition of LFOs is the only way to assure an appropriate award of costs. Id. at 834. Precluding this exercise of discretion in this case, due to the failure to challenge costs before they were awarded, at a point when the cost bill could not be denied, would subvert the ends of justice.

D. CONCLUSION

This Court should hold that a challenge to appellate costs is timely made when first raised in a motion to modify the award of costs. It should grant Mr. Hutchinson's motion to modify the commissioner's ruling.

DATED January 16, 2017.

Respectfully submitted,



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Today I caused to be mailed a copy of the Supplemental Brief of Appellant in *State v. Claude Hutchinson,* Cause No. 45996-5-II as follows:

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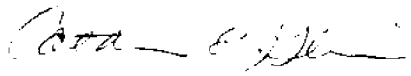

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